

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of
the Interior, et al.,

Defendants.

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) No. 1:96CV01285
) (Judge Lamberth)
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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE
ORDER REQUIRING DEFENDANTS TO FILE WITH THE COURT, AND PRODUCE
TO PLAINTIFFS, DOCUMENTATION CONCERNING WHAT THE UNITED STATES
HAS PAID TO ITS EXPERTS AND FOR RELATED RELIEF**

On November 14, 2003, Plaintiffs inexplicably filed a Motion for Protective Order Requiring Defendants To File With the Court, and Produce to Plaintiffs, Documentation Concerning what the United States Has Paid to its Experts ("Motion"). Plaintiffs' Motion is an improper, premature discovery request disguised as an improper motion for protective order. The Motion should be denied.

On October 9, 2003, Plaintiffs filed a Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act ("Request"). As discussed in Defendants' Opposition to the Request, the Request is defective, among other reasons, for failing to include an itemized statement of the expert witness fees and expenses sought, as required by the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). Opposition at 4-6. In the Request, Plaintiffs cryptically announce that they paid "more than \$10 million" to experts, but provide absolutely no support for this announcement. See Request at 4. In the Opposition to the Request, Defendants note that recovery of the entire \$10 million is not automatic and is subject

to analysis of the reasonableness of the fees incurred – an analysis that cannot be undertaken until Plaintiffs provide the required itemized statement of the fees requested. Opposition at 5 n.3. Defendants also noted that 28 U.S.C. § 2412(d)(2)(A) limits the rate at which an expert can be compensated under EAJA to the highest rate at which the United States paid its experts. Id.

Instead of correcting the defects in their EAJA Request and filing a completed petition with an itemized statement of the requested fees, Plaintiffs filed their Motion asking that the United States provide vast amounts of irrelevant information about what it has paid experts in other, unrelated cases over the last five years. Plaintiffs' motion is improper under the Federal rules, has no basis under EAJA, and should be denied.

ARGUMENT

I. PLAINTIFFS' MOTION FOR PROTECTIVE ORDER IS NOT PROPER UNDER THE FEDERAL RULES

Finding their petition for an award of fees and expenses under EAJA soundly opposed by Defendants, Plaintiffs have since sought to forestall the Court from ruling on their petition. Plaintiffs first moved to enlarge their time to submit contemporaneous records of fees and costs they have incurred, and now they have improperly moved for a so-called “protective order” that is not a protective order motion at all, but rather a thinly disguised request to conduct a fishing expedition into what the government has been charged and what the government has paid for expert witness services in this and other wholly unrelated cases. In a footnote, Plaintiffs cite only the general rule governing entry of protective orders in civil cases, Fed. R. Civ. P. 26(c), but they proffer no authority for their unprecedented request that a "protective order" be issued "requiring defendants to produce to this Court and to plaintiffs all the relevant documentation that may

pertain to an analysis of any possible Cap" on expert fees. Motion at 2. Defendants could find no authority for such a "protective order" either, and the Motion should be denied as improper.

Rule 26(c) of the Federal Rules of Civil Procedure governs protective orders in federal civil cases; it permits such orders to shield a litigant (or other discovery target) against "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The rule does not authorize the entry of a protective order for the purpose of compelling discovery, especially discovery that has never even been requested by the moving party.¹

"Protective orders" were initially conceived as a means for controlling the conduct of depositions in civil cases. 8 Alan Wright, Arthur Miller, & Richard Marcus, FED. PRAC. & PROC. § 2035 (2d ed. 1994 & Supp. 2003) (noting that the protective provisions of today's Rule 26(c) were previously set forth in Rule 30(b) concerning depositions). Since then, the protective order mechanism has been restyled to be available to protect against improper discovery requests whether sought in the form of a deposition or by other means. Id.

Although protective orders are most often sought by the person or party from whom the discovery is sought, they can, in some narrow instances, be requested by the party seeking the discovery. See generally Haymes v. Smith, 73 F.R.D. 572, 573-75 (S.D.N.Y. 1976) (prisoners seeking to depose out-of-state defendants could request that court order defendants to pay reasonable cost of the deposition); Central Hide & Rendering Co. v. B-M-K Corp., 19 F.R.D. 296 (D. Del. 1956) (party taking deposition could move for protective order to exclude certain

^{1/} Indeed, Plaintiffs not only attempt to misuse the protective order provision of the Federal Rules, but also seek, in effect, to exempt themselves from the traditional requirement that a party seek to discover facts by the means provided in the Rules. In addition, Plaintiffs have not sought leave from this Court to take such discovery out of time.

persons from attending). Even in those rare instances, however, the protective order is only employed as a means to avoid "annoyance, embarrassment, oppression, or undue burden or expense" and is not itself the authority by which discovery is commanded. Cf. Stortz v. Seier, 835 S.W.2d 540, 543 (Mo. App. Ct. 1992) (when a party is seeking discovery, "a protective order is inappropriate to protect that party from himself"). Plaintiffs' Motion, therefore, is fatally and irreparably flawed because it is improperly based upon the protective order provision of the federal rules.²

II. NO BASIS EXISTS UNDER EAJA FOR THE RELIEF PLAINTIFFS SEEK

With their Motion, Plaintiffs have taken a unique, backward approach to EAJA petitions. Plaintiffs accuse Defendants of "invoking" the limits in § 2412(d)(2)(A), thus triggering their right to obtain discovery concerning payments by the United States to its experts. Motion at 2. But until Plaintiffs file a proper EAJA petition that enables the government and the Court to assess the reasonableness of the requested fees incurred, Defendants cannot know whether they will object to their reasonableness, and cannot know whether the rate limit set forth in § 2412(d)(2)(A) has been violated.

Once a proper EAJA petition has been filed, Plaintiffs have the burden of proof with regard to the reasonableness of the fees requested. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). If, however, Defendants then "invoke" § 2412(d)(2)(A) and argue that some

² Federal Rule of Civil Procedure 37(a)(2)(B) provides for a motion to compel production of documents only after (1) a request for production under Rule 34 by the moving party; (2) a failure to produce such documents by the responding party; and (3) an attempt by the moving party to confer to obtain the information without court action. Fed. R. Civ. P. 37(1)(2)(B). Plaintiffs have not met any of these requirements.

identified expert fee should be reduced because it is “in excess of the highest rate of compensation for expert witnesses paid by the United States,” 28 U.S.C. § 2412(d)(2)(A), it is at that time that Defendants would need to provide some evidence regarding the highest rate of compensation it has paid its experts.³ Until that occurs, the issue of the rates paid to experts by the United States is of merely hypothetical interest to Plaintiffs.⁴ Good cause for a protective order cannot exist to satisfy the abstract curiosity of Plaintiffs. The Motion should be denied.

³ Plaintiffs seem to have a misconception about the rates paid to an expert by the United States. There is no uniform expert witness fee. Numerous factors are considered, but one of the most important is the reasonable, market rate for the area of expertise. Information about the rates paid experts in other cases involving unrelated areas of expertise, such as antitrust experts in the Microsoft case, are entirely irrelevant, unless Plaintiffs are planning to include a reimbursement request for an antitrust expert in their EAJA request for this case.

⁴ In addition, the better reading of § 2412(d)(2)(A) would examine the rates paid by the United States in the same case in which the EAJA fees are requested, see Olympic Marine Services, Inc. v. United States, 792 F. Supp. 461 (E.D. Va. 1992), rather than look to other, unrelated cases, as proposed by Plaintiffs. See Motion at 4-6. Moreover, as the Supreme Court has held, “[t]he EAJA renders the United States liable for attorney fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.” Ardestani v. INS, 502 U.S. 129, 137 (1991); see also St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446 (D.C. Cir. 1989).

CONCLUSION

For these reasons, Plaintiffs' Motion for a Protective Order should be denied.

Dated: November 26, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 26, 2003 the foregoing *Defendants' Opposition to Plaintiffs' Motion for Protective Order Requiring Defendants to File with the Court, and Produce to Plaintiffs, Documentation Concerning What the United States Has Paid to its Experts and for Related Relief* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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ORDER

This matter comes before the Court on *Plaintiffs' Motion for Protective Order Requiring Defendants To File With The Court, And Produce To Plaintiffs, Documentation Concerning What The United States Has Paid To Its Experts And For Related Relief* (Dkt. # 2378). Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs' Motion for a Protective Order is DENIED.

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

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